

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION NO. 41D-)
30002459 BY BIG HOLE GRAZING)
ASSOCIATION & MONTANA DEPARTMENT)
OF TRANSPORTATION AND APPLICATION)
NO. 41D- 30002460 BY BIG HOLE GRAZING)
ASSOCIATION)**

FINAL ORDER

BACKGROUND

The Proposal for Decision (PFD) in this matter was entered on August 31, 2005. Applicant Big Hole Grazing Association (BHGA) filed timely exceptions and brief to the PFD on September 19, 2005 and applicant Montana Department of Transportation (MDT) filed timely exceptions and brief to the PFD on September 14, 2005. MDT requested an oral argument hearing. Objector Wisdom River Cattle Company (WRCC) filed a brief in opposition to the exceptions filed by BHGA and MDT. Oral argument on the exceptions was held on March 15, 2006. Presenting argument at the oral argument were Lyle Manley and Don MacIntyre for applicant MDT; Mike Manion for applicant BHGA; Ron Waterman for objector WRCC; and Calvin Erb for objectors John Erb, Erb Livestock, and Jack Hirschy Livestock, Inc.

The PFD recommended denial of Application 41D-30002459 (permit application) because the Hearing Examiner found that the applicants did not prove that water was legally available and that applicants did not prove that the water rights of a prior appropriator would not be adversely affected. The Hearing Examiner also recommended denial of Application 41D-30002460 (change application) based on her finding that the applicant did not prove that existing water rights would not be adversely affected, that the proposed means of diversion, construction and operation of the appropriation works are adequate, and that the quantity of water proposed to be used is the minimum necessary for the proposed beneficial use.

STANDARD OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department may, in its final order: reject or modify the conclusions of law and interpretation of administrative rules

in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence, but may be less than a preponderance. *Strom v. Logan*, 304 Mont. 176, 18 P.3d 1024 (2001). Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. ARM 36.12.229(2). The record was closed at the end of the hearing. No evidence presented after the record was closed has been considered in this decision.

Subsequent to the preparation of the Proposal for Decision, and after the filing of exceptions and oral argument on the exceptions, but before this final decision was written, the Montana Supreme Court issued its decision in *Montana Trout Unlimited v. Montana Department of Natural Resources and Conservation*, No. 05-069, 2006 MT 72. 331 Mont. 483, P.3d. The Court reversed the court below and remanded the case for further proceedings. Of note, the Supreme Court stated:

The legislature provided an exception to the Basin Closure Law for groundwater, provided it is not "immediately or directly connected to" the Upper Missouri River's surface flow. DNRC's interpretation of the Basin Closure Law conflicts with the statute, and does not provide sufficient protection to reasonably effectuate its purpose. Section 2-4-305(6), MCA. DNRC's interpretation recognizes only immediate connections to surface flow caused by induced infiltration and ignores the less immediate, but no less direct, impact of the prestream capture of tributary groundwater. The Basin Closure Law serves to protect senior water rights holders and surface flows along the Smith River basin. It makes no difference to senior appropriators whether groundwater pumping reduces surface flows because of induced infiltration or from the prestream capture of tributary groundwater. The end result is the same: less surface flow in direct contravention of the legislature's intent.

Trout Unlimited, ¶43.

I have considered the exceptions and reviewed the record under these standards.

PERMIT APPLICATION NO. 41D-30002459

1. General. The exceptions of both MDT and BHGA are based, it appears at least in part, on the PFD impliedly suggesting that BHGA can never fill in its own drainage ditches should it choose to do so. Applicants misperceive the Hearing Examiner's proposed order. The only part of the PFD which discusses the filling in of the ditches appears in the "Adverse Effect" portion of the proposed order (page 6 of 17). The Hearing Examiner simply states in Finding of Fact 17 that "[the water] would eventually discharge to Rock Creek if not appropriated by the Applicant. This is true whether or not Applicant fills in the drain ditches as proposed. ... When the drain ditches are filled in, the water will discharge to Rock Creek at a different time and location." The Hearing Examiner then finds in Finding of Fact 19 that the "Applicant did not provide any evidence or analysis to show that the water rights of prior appropriators will not be adversely affected when the flow of ground water parallel to Rock Creek is reduced as a result of *consumptive use* of that water." (emphasis supplied). The adverse effect to which the Hearing Examiner refers is the evaporation from the artificially dug pond which constitutes an overall loss of water to the system and does not stand for the proposition that the Department of Natural Resources and Conservation (Department) can prevent a landowner from filling in drainage ditches on their own land.

2. Application and Public Notice. MDT filed an Exception to Finding of Fact 7. MDT misperceives the finding. The Hearing Examiner properly found that the permit application, in its present state, is a request for an appropriation only from the open water (pond) area, a subset of the original application (Finding of Fact 7.a.). Finding of Fact No. 7.b. appears to be simply a discussion of the procedural history of the evolution of the application and finds that the *letter* of November 8, 2004 did not change the *amount* of the appropriation, but only changed the *design* of the open water area. The Hearing Examiner properly found that the change in the *amount* of the appropriation occurred at the *hearing*, that the change in the amount was a reduction in the requested appropriation thus not requiring re-notice of the application (Conclusion of Law No. 3), and allowed the proceeding to continue.

3. Legal Availability. MDT filed an Exception to Finding of Fact 14. The weight of the evidence does show that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate. The determination of legal availability is based on the physical availability of water, the existing legal demands on the source of supply throughout

the area of potential impact, and an analysis of those two factors. The Hearing Examiner found that water is physically available (Finding of Fact 11). The Hearing Examiner appears to place considerable importance on the lack of analysis regarding Ground Water Certificate 41D-7613800, a domestic well 101 feet deep located over a mile from the project site. There is no evidence in the record that this well will be affected by this permit application and there is uncontroverted evidence in the record which shows that there will be an increase in the groundwater level in the vicinity of the project. The weight of the evidence clearly shows that, as to the well in question, the permit application will not affect the legal availability of water for that well. As stated earlier, this matter does not stand for the proposition that the Department can prevent a landowner from filling in drainage ditches on their own land. Montana law has long recognized that a proprietor of land "has the right to change the flow of waste water thereon in the reasonable enjoyment of his own property" provided that "the use must be without malice or negligence." *Newton v. Weiler*, 87 Mont. 164, 286 P. 133 (1930). Any question of malice, negligence, or detrimental reliance on the water which flowed in the drainage ditches, or which would prevent a change in the land use practices of a landowner is a question that is beyond the jurisdiction of this Department. The evidence supports a finding that water can be reasonably considered legally available for this permit application. Finding of Fact 14 is rejected.

4. Adverse Effect. MDT filed an exception to Finding of Fact 15. The Hearings Examiner properly found that the use of water cannot be controlled. There is no plan for the exercise of the permit that demonstrates that the applicant's use of water will be controlled or augmented so the water right of a prior appropriator can be satisfied. Finding of Fact 15 will not be modified or rejected.

MDT filed an exception to Finding of Fact 16. For the same reasons given for Finding of Fact 15, Finding of Fact 16 will not be modified or rejected.

MDT filed an exception to Finding of Fact 17. Finding of Fact 17 is simply a recitation of the evidence that the ultimate fate of the water which will flow either through the ditch system or through the ground if the ditches are filled in. Finding of Fact 17 will not be modified or rejected.

MDT filed an exception to Finding of Fact 19. The Hearing Examiner properly found that the applicant has not shown that prior appropriators on Rock Creek would not be adversely affected by the permit application. The application (as modified by the November 8, 2004 letter

and at the hearing) requests an appropriation for the initial fill and evaporation from an *artificially dug* pond. The Hearing Examiner properly found that the applicant failed to prove that the consumptive use (evaporation) of water, which otherwise would have eventually flowed to Rock Creek, would not adversely affect prior appropriators. This consumptive use represents a loss of water to the system beyond which would occur naturally, and the applicant has not shown that there will be no adverse affect from that loss. Applicant asserts that the accompanying change application is an “augmentation plan” which was not considered by the Hearing Examiner. The weight of the evidence indicates that the change application shows that as it exists now it is an augmentation of the *project* (i.e. to enhance the character of the proposed wetlands), and not an augmentation to make up for the loss of water through consumptive use. The Hearing Examiner properly found that the evaporation from the pond cannot be controlled and that there is no plan for control or augmentation of the evaporation. Finding of Fact 19 will not be modified or rejected.

5. Beneficial Use. MDT filed an exception to Finding of Fact 22. Finding of Fact No. 22 states that the amount of water needed for the initial fill of the pond is 6.10 acre-feet and is in error. The figure for the initial fill for the pond should be 6.84 acre-feet and Finding of Fact 22 will be modified to reflect the correct amount. (Finding of Fact 7.a.).

MDT filed an exception to Finding of Fact 24. Finding of Fact No. 24 is in error in that the figure of 13.1 inches per year is the annual precipitation for the area, not the amount of water consumed by plants (Exhibit AMDT 5). The discussion of the water consumed by plants in Finding of Fact 24 is not relevant to the issue of the permit application. The permit application is for the evaporation from the open water surface, not the evapotranspiration from plants in the project area. Finding of Fact 24 should be modified to read “I find that the annual precipitation for the project area is 13.1 inches per year.”

In addition, Finding of Fact 26 should be modified to reflect an “annual consumptive use from the pond after the initial fill will be 5.40 acre-feet per year.” Due to the error in Finding of Fact 24, Table 1 in the Attachment to the Proposal should be changed to reflect “Precipitation” of 13.1 inches per year, “Net Evaporation” of 20.8 inches per year, and “Consumptive Use” of 5.40 acre-feet per year.

MDT filed an exception to Finding of Fact 27. Finding of Fact No. 27 is in error. The initial fill of the pond is 6.84 acre-feet, not 6.10 (Finding of Fact 7.a.), plus an additional 5.4 acre-

feet per year, not 7.3 acre-feet per year. Evapotranspiration from a change in plant species is not relevant to the permit application. The application is for the open water pond area (Finding of Fact 7.a.) and not for the alleged increase in evapotranspiration caused by a change in the vegetative cover in the project area. The evidence presented shows that any change in vegetative cover will occur as a result of an expected rise in the water table due to the filling in of the drainage ditches, an action which is not within the jurisdiction of the Department. The evidence also supports that the change in the vegetative cover will occur as a result of natural succession and not through the planting of specific species (Testimony of Mark Brooke).

6. Conclusions of Law. MDT also filed exceptions to Conclusion of Law 7 (legal availability), 8 (adverse effect), and 14 (all criteria are met). Conclusion of Law 7, concerning legal availability should be rejected for the reasons given in the discussion under “2. Legal Availability, above.” Conclusion of Law 8 and 14 will not be modified or rejected.

7. *Trout Unlimited v. Montana Department of Natural Resources and Conservation.*

The rule in Montana regarding the retroactive application of a Supreme Court decision was explained in *Dempsey v. Allstate Insurance Company*, 325 Mont. 207 (2004). The conclusion in *Dempsey* was:

All civil decisions of this court apply retroactively to cases pending on direct review or not yet final, unless all three of the *Chevron* factors are satisfied. For reasons of finality we also conclude that the retroactive effect of a decision does not apply *ab initio*, that is, it does not apply to cases that became final or were settled prior to a decision's issuance.

2004 MT 391, ¶31, 325 Mont. 207, ¶31, 104 P.3d 483, ¶31; see also *Schmill v. Liberty Northwest Ins. Corp.* 205 MT 144, 327 Mont. 293, 114 P.3d 204.

The three *Chevron* factors are: 1) the decision must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; 2) weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and 3) weigh the inequity imposed by retroactive application. As to the second factor, the Montana Supreme Court has said “[t]his Court has boiled this language down to simply asking whether the retroactive application of a rule of law will further or retard its operation” *Schmill*, ¶15. The decision in *Trout Unlimited* itself rejects the second *Chevron* factor when it says that the

Department's definition "does not provide sufficient protection to reasonably effectuate its [the basin closure law] purpose" *Trout Unlimited* ¶43. I have been advised by counsel for MDT and Wisdom River Cattle Company of the *Trout Unlimited* decision and whether the decision is controlling in this case. I find that the decision is retroactive to the instant matter.

I find that the record in this matter is replete with uncontroverted evidence that the groundwater requested for appropriation, if not appropriated, would otherwise contribute to the flow of Rock Creek. (Department record, testimony of Mark Brooke, testimony of Eloise Kendy, Exhibits OWR1, AMDT6, AMDT7, Criteria Addendum).

Conclusion of Law No. 4 is modified to read: "The basin closure provisions of Mont. Code Ann. § 85-2-343(1) apply to this application. Groundwater which is not "immediately or directly" connected to surface water is exempt from the basin closure provisions. The Montana Supreme Court in *Trout Unlimited v. Montana Department of Natural Resources and Conservation*, No. 05-069, 2006 MT 72, has determined that in addition to the Department's interpretation that groundwater is "immediately or directly" connected if it is "pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration" Mont. Admin. R. 36.12.101(33), "immediately or directly" also includes the "prestream capture of tributary groundwater" *Trout Unlimited*, ¶43. Based on my finding above, Application No. 41D-30002459 is not exempt from the provisions of Mont. Code Ann. § 85-2-343(1).

CHANGE APPLICATION NO. 41D-30002460

1. Historic Use/Adverse Effect. BHGA filed an exception to Finding of Fact 38. A review of the record reveals that the weight of the evidence supports the finding that the 80-acre place of use was irrigated to grow pasture grasses until 2001. Finding of Fact 38 will not be modified or rejected.

BHGA filed an exception to Finding of Fact 39. BHGA argues that consideration of evapotranspiration of the pasture is an error in that BHGA has the right to fill in the drainage ditches without Department approval. Finding of Fact 39 actually is simply one finding of fact used to determine the historic consumptive use (totaled in Finding of Fact 41 which was not excepted to). Finding of Fact 39 will not be modified or rejected.

BHGA filed exceptions to Findings of Fact 42, 47, and 48. I find that these findings of fact are only supporting evidence that the proposed consumptive use will be greater than the historic consumptive use. Findings of Fact 42 and 48 will not be modified or rejected. Finding of Fact 47 will be modified as explained below. The Hearings Examiner found that the historic consumptive use for the project area is 128 acre-feet per year (Finding of Fact 41). This figure represents the historic evapotranspiration from the site as it exists today and does not include any conveyance loss from the diversion to the project site. As the Hearings Examiner properly found, a key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed (Conclusion of Law 18). I note at this point that the project is aimed at returning the site to the wetland conditions prior to the construction of the drainage ditches. It was only after the construction of those drainage ditches that an irrigation water right was needed to support the current pasture grasses. Presumably, by filling in the drainage ditches the site will return to the previous wetland conditions, thus obviating the need for the irrigation completely. That, however, is not the issue in this matter. The issue here is whether this change application can meet the criteria of Mont. Code Ann. § 85-2-402, or if there are terms and conditions which can be imposed on the change application which will allow the application to meet the criteria of Mont. Code Ann. § 85-2-402.

Applicant claims 1 cubic foot per second (cfs) up to 320 acre-feet is diverted under water right claim No. 41D1294600 from Helen Springs. The period of diversion for this claim is from April 15 to October 15, a period of 184 days. Accepting the Hearings Examiner's finding of 128 acre-feet of historical consumptive use due to evapotranspiration from the project area, and using a conveyance loss of 50 percent (0.5), based on the Department's and this Examiner's knowledge of ditch losses in material typically found in the Big Hole drainage, a diversion of 256 acre-feet of water is a reasonable estimate of the total amount of water needed to support the historical consumptive use. 256 acre-feet of water applied continuously for a period of 184 days equates to a diversion rate of 0.70 cfs. If the applicant's change application is conditioned such that the diversion to the project area is limited to 0.70 cfs, leaving 0.30 cfs to flow into Rock Creek to prevent adverse effects, the application can meet the change criteria.

2. Adequacy of Appropriation Works. BHGA filed exceptions to Finding of Fact 49. My review of the entire record in this matter shows that the appropriation works for this change application are adequate, given that there is no planned change in the manner in which water is

to be delivered under this proposed change application and if the proposed conditions outlined above are followed, there will in fact be a reduction in the amount of diversion, which the existing works should be able to handle. The change application should also be conditioned such that a measuring device is installed and maintained to ensure that the conditions of the change application are being complied with. Finding of Fact 49 is modified as follows: "There is uncontroverted evidence showing that the appropriation works are adequate." (Testimony of Nick Novich and Mark Brooke)

3. Beneficial Use. BHGA filed an exception to Finding of Fact 51. The Hearings Examiner, in Finding of Fact 50, finds that the use of the water for wetland mitigation purposes is a beneficial use. In Finding of Fact 51, the Hearings Examiner found that the record does not show that the rate and volume of water proposed to be diverted is the minimum necessary to accomplish the proposed use without waste. The evidence supports a finding that the wetland species proposed for the area will consume more water than that which is currently used by pasture grasses and that by limiting the amount of water delivered to the area to the historic beneficial use, all of the water will be beneficially consumed by wetland plant species without waste. Finding of Fact 51 is rejected.

4. Conclusions of Law. BHGA also filed exceptions to Conclusion of Law 18 (adverse effect), 19 (adequacy of diversion works), and 21 (minimum amount necessary). For the reasons given in the preceding discussion, and with the terms and conditions listed below, Conclusions of Law 18, 19 and 21 are reversed.

CONCLUSION

Application for Beneficial Water Use Permit No. 41D-30002459 must be denied because the proposed appropriation of groundwater is not exempt from Mont. Code Ann. § 85-2-343(1), and the applicant has failed to prove all of the criteria in Mont. Code Ann. § 85-2-311(1).

Application to Change a Water Right No. 41D-30002460 should be granted, as conditioned below, as the applicant has proven the criteria in Mont. Code Ann. § 85-2-402.

ORDER

Application for Beneficial Use Permit No. 41D-30002459

The Department hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Finding of Fact 14 shall read: "I find that the weight of the evidence shows that water can be considered reasonably be considered legally available during the period in which the applicant seeks to appropriate. The water which applicant seeks to appropriate is a result of a rise in the groundwater table due to the filling in of the ditches which currently drain the site." (Testimony of Mark Brooke)."

Finding of Fact 22 shall read: "I find that the amount of water needed for the initial fill of the open water area is 6.84 acre-feet which is the capacity of the excavation. (Application, Department file.)"

Finding of Fact 24 shall read: "I find that the annual precipitation for the project area is 13.1 inches per year. (Exhibit AMDT5)."

Finding of Fact 26 shall read: "I find that the annual consumptive use from the pond after the initial fill will be 5.40 acre-feet per year. (Findings of Fact Nos. 23-25 and Table 1)."

Finding of Fact 27 shall read: "I find the amount of water needed to accomplish the beneficial use of wetland mitigation that is associated with the open water area (pond) without waste is 6.84 acre-feet for the initial fill plus an additional 5.40 acre-feet per year. (Findings of Fact Nos. 22 and 26 and Table 1)."

Conclusion of Law 4 shall read: "The basin closure provisions of Mont. Code Ann. § 85-2-343(1) apply to this application. Groundwater which is not "immediately or directly" connected to surface water is exempt from the basin closure provisions. The Montana Supreme Court in *Trout Unlimited v. Montana Department of Natural Resources and Conservation*, No. 05-069, 2006 MT 72, has determined that in addition to the Department's interpretation that groundwater is "immediately or directly" connected if it is "pumped at the flow rate requested in the application and during the proposed period of diversion, induces surface water infiltration" Mont. Admin. R. 36.12.101(33), "immediately or directly" also includes the "prestream capture of tributary groundwater" *Trout Unlimited*, ¶43. Based on my finding above, Application No. 41D-30002459 is not exempt from the provisions of Mont. Code Ann. § 85-2-343(1)."

Conclusion of Law 7 shall read: "Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available in the amount requested during the period in which the applicant seeks to appropriate. Mont. Code Ann. § 85-2-311(1)(a)(ii). This subsection requires the applicant to prove that water can reasonably be considered legally available based on the records of the Department and other evidence provided to the Department. Applicant has shown that the water requested for appropriation will result from a rise in the groundwater table due to the filling in of the drainage ditches currently installed on applicant's land. (Finding of Fact 14 and 3. Legal Availability, above)."

Table 1 in the Attachment to the Proposal for Decisions is modified to read "Total Evaporation (in/year) 33.90; Precipitation (in/year) 13.1; Net Evaporation (in/year) 20.8; and Consumptive Use (acre-feet/year) 5.40."

It is therefore **ORDERED** that Application for Beneficial Water Use Permit No. 41D-30002459 is **DENIED**.

Application to Change a Water Right No. 41D-30002460

The Department Hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter.

Finding of Fact 47 is modified by adding at the end: "Applicant claims 1 cubic foot per second (cfs) up to 320 acre-feet is diverted under water right claim No. 41D1294600 from Helen Springs. The period of diversion for this claim is from April 15 to October 15, a period of 184 days. Accepting the Hearings Examiner's finding of 128 acre-feet of historical consumptive use due to evapotranspiration from the project area, and using a conveyance loss of 50 percent (0.5), based on the Department's and this Examiner's knowledge of ditch losses in material typically found in the Big Hole drainage, a diversion of 256 acre-feet of water is a reasonable estimate of the total amount of water needed to support the historical consumptive use. 256 acre-feet of water applied continuously for a period of 184 days equates to a diversion rate of 0.70 cfs. If the applicant's change application is conditioned such that the diversion to the project area is limited to 0.70 cfs, leaving 0.30 cfs to flow into Rock Creek to prevent adverse effects, the application can meet the change criteria."

Finding of Fact 49 shall read: "There is uncontroverted evidence showing that the appropriation works are adequate. (Testimony of Nick Novich and Mark Brooke, Finding of Fact 38, 2. Adequacy of Appropriation Works, above)."

Finding of Fact 51 is rejected. (3. Beneficial Use, above).

Conclusion of Law 18 shall read: "The Department may approve a change in appropriation right subject to terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of Mont. Code Ann. § 85-2-402 (Mont. Code Ann. § 85-2-402(8)). The Applicant has proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected if the change is modified as discussed in Finding of Fact 47 (Mont. Code Ann. § 85-2-402(2)(a)). The applicant for a change of appropriation right has the burden as to the nonexistence of adverse effect (See Matter of Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)). Subsequent (junior) appropriators are entitled to have the water flow in the same manner as when they located (Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727 (1908); In the Matter of Application to Change a Water Right No. 76N 30001166 by Thomas and Loreli Mowery, Proposal for Decision (2004) (Final order adopted findings of fact and conclusions of law in proposal for decision)).

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed (In The Matter Of Application To Change A Water Right No. 40M-30005660 By J. Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co/Richard Berg, Proposal for Decision (2005) (Final order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I-30002512 by Brewer Land Co, LLC, Proposal for Decision (2003) (Final order adopted findings of fact and conclusions of law in proposal for decision). Here, a preponderance of evidence shows that the change application can meet the criteria in Mont. Code Ann. § 85-2-402(2)(a) if conditioned by the Department to limit the use of water to that historically consumed. (See Finding of Fact No. 47.)"

Conclusion of Law 19 shall read: "The applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. (Mont. Code Ann. § 85-2-402(2)(b)). (Finding of Fact 49)."

Conclusion of Law 21 shall read: "The applicant has proven by a preponderance of the evidence that with the condition placed on the proposed change by the Department that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use."

It is therefore further **ORDERED** that Application to Change a Water Right No. 41D-30002460 is **GRANTED** subject to the terms and conditions below.

Conditions

Application to Change a Water Right No. 41D-30002460 should be granted subject to the following conditions:

1. Applicant will only divert for the benefit of the Montana Department of

Transportation wetlands mitigation project located in the NW1/4, Sec. 2, T4SR16W, Beaverhead County from Statement of Claim No. 41D-1294600 a maximum of 0.70 cfs of their 1.0 cfs claim between the dates of April 15 and October 15, subject to call from senior appropriators.

2. Applicant will install and maintain a diversion structure and measuring device to ensure that no more than 0.70 cfs of their 1.0 cfs claim under Statement of Claim No. 41D-1294600 is diverted at any time.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 18th day of May, 2006.

/Original signed by David A. Vogler/

David A. Vogler
Hearings Officer
Water Resources Division
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 18th day of May, 2006 by first class United States mail.

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